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Supreme Court, U.S.
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No. 04-478

IN THE

Supreme Court of the United States

STEVEN LOFTON, *et al.*,

Petitioners,

v.

SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT

Petitioners brought this suit in May of 1999, asking that Florida's gay adoption law be declared unconstitutional on its face and as applied. The challenge was essentially twofold.

On one hand, Petitioners said the statute violated their fundamental rights of privacy, intimate association and family integrity by preventing the relationships between the child plaintiffs and their respective adult caregivers, Mr. Lofton and Mr. Houghton, from being made permanent via adoption. Pet. App. 145a-46a. It being undisputed below that there is no fundamental right to adopt or to be adopted, however, the district court and the court of appeals rejected Petitioners' family integrity claims, which are not raised as a basis for certiorari in this case. Pet. App. 11a-18a, 124a, 153a.

On the other hand, Petitioners also said that the statute violated their right to equal protection. Pet. App. 145a-46a. On equal protection, the chief defense of Florida's gay adoption law – which was the only defense accepted by the district court or the court of appeals – was that it was rationally related to the best interests of children in being placed for adoption in homes with married mothers and fathers. R3-117-(Defs. Motion for Summary Judgment ("MSJ") at 14-16). As Respondents pointed out below, prior case law from Florida and elsewhere had recognized that it is rational to believe that children need male and female influences to develop optimally, particularly in the areas of sexual and gender identity, and heterosexual role modeling. R3-117-(MSJ at 14-15). Respondents also pointed to a child's interest in stability, an interest rationally thought to be served by marriage. Pet. App. 128a.

In response, Petitioners failed to dispute that it is in the best interests of children to be raised by a mother and a father

who are married. They also failed to dispute that harms are posed to children when they are denied either a mother or a father. Instead, their position at summary judgment was as follows:

> The State points to an interest in providing children with both a mother and a father. They suggest that their analysis of any harms posed by the denial of both a mother and a father are undisputed by the Plaintiffs. Plaintiffs do not see the need to get into that expert discussion in this motion because the fact is that still wouldn't explain the classification.

R5-153-(Transcript of Oral Argument at 27).

Following Petitioners' rejection of "expert discussion" at summary judgment, the district court explained that the Petitioners in this case:

> did not object to nor disagree with Defendants' statements that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes in their memorandum or during oral arguments. Plaintiffs have not asserted that they can demonstrate that homosexual families are equivalently stable, are able to provide proper gender identification, or are no more socially stigmatizing than married heterosexual families. It is Plaintiffs' burden as the one attacking the homosexual adoption provision to negate every conceivable basis which might support it. Plaintiffs have chosen not to do so[] and, thus,

> have left unchallenged Defendants' assertion that the best interest of a child is to be raised by a married family.

Pet. App. 129a-30a.

After summary judgment was entered against them, Petitioners submitted previously unfiled expert affidavits and DCF 30(b)(6) depositions, requesting the district court to reconsider the summary judgment in light of the new evidence. R4-144-(Reconsideration Motion at 14-18). The district court struck the new filing as untimely, and as an "unfair attempt to change the record for purposes of appeal." R4-155-(Order Denying Reconsideration at 3).

Despite the district court's ruling, Petitioners' brief with the Eleventh Circuit included the items previously stricken. After Respondents moved to strike the initial brief for including the items, the court of appeals allowed the record to be supplemented with them. In that process, Petitioners disavowed any reliance on the expert affidavits and 30(b)(6) depositions as to equal protection, and did not argue that the district court erred in striking them. Brief of Appellants, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 6 n.6; Reply of Appellants in Support of Motion to Correct or Modify the Record on Appeal, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 5.

Apart from those aspects of the case highlighted above, Respondents adopt the opinions of the district court and the court of appeals as their statement of this case.

REASONS FOR DENYING THE PETITION

Certiorari should be denied. Petitioners failed to preserve their argument that Florida's gay adoption law burdens any right of private adult sexual intimacy. They also failed to challenge the chief rational bases asserted in support of the law.

Petitioners also fail to show that the decision below or other lower court decisions have "disregarded" this Court's precedents in *Romer v. Evans*, 517 U.S. 620 (1996), or *Lawrence v. Texas*, 539 U.S. 538 (2003), or that there is any disparity in how these decisions are interpreted by the lower courts. Given that there is no conflict and no claim of conflict between the decision below and that of any other federal court, certiorari would be inappropriate.

I. PETITIONERS FAILED TO PRESERVE ANY CLAIM RELATING TO PRIVATE ADULT SEXUAL INTIMACY IN THIS CASE.

Petitioners assert that the Eleventh Circuit's decision in this case "profoundly misread" *Lawrence*, thereby "undermining the significance" of that opinion. The significance of *Lawrence*, they say, is that it described a "long established" right to private adult sexual intimacy that requires "heightened scrutiny" of the gay adoption law, under which the law "must fail." Pet. 21, 25.

The difficulty in this case is that Petitioners never raised any "long established" right of private adult sexual intimacy when they brought this suit. Nor did they ever suggest that it was an issue for trial. Pet. App. 151a-52a. Consequently, when the district court granted summary judgment, it began its analysis by noting pointedly and specifically that "Plaintiffs do not assert a right of privacy to sexuality or sexual practice between adults." Pet. App. 120a.

Petitioners never objected to nor disagreed with this statement by the district court, and did not assert any sexual privacy rights in the principal briefs at the court of appeals, either. It was only following the June, 2003 *Lawrence* decision that Petitioners raised any sexual privacy rights claim, which they did in supplemental briefing filed four months after oral argument at the court of appeals and nearly two years after summary judgment at the district court.

Of course, the Eleventh Circuit did address *Lawrence* on supplemental briefs, and it was not improper per se for Petitioners to raise the issue here. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). But the fact that the issue was not raised at the district court prevented the very inquiry Petitioners now say they want – a weighing of the relative interests served by the statute versus the interests served by what Petitioners call a "longstanding" right to adult sexual intimacy they say was applied in *Lawrence*. It is simply a different lawsuit than the one Petitioners chose to bring over five years ago. Given the undeveloped state of the factual record on point, this case is a poor vehicle for such an inquiry.

II. PETITIONERS FAILED TO CONTEST THE ASSERTED RATIONAL BASES FOR THE STATUTE.

This case is also a poor vehicle to resolve Petitioners' equal protection challenge. As noted earlier, *supra.* at 2-3, Petitioners defaulted on the question whether it is in the best interest of children to be placed in homes with married mothers and fathers, and on whether children are harmed by not having a mother and a father. Florida's interest in placing children with married mothers and fathers had been recognized as legitimate by Florida state courts. *See Amer v. Johnson*, 4 Fla.L.Wkly. Supp. 854 b (Fla. 17th Cir. 1997). It was presented to the district court in accordance with the procedure used in *Gregory*

v. Ashcroft, 501 U.S. 452 (1991)(prior state court case law recognition of rational bases for judges' mandatory retirement law supported dismissal of equal protection claims).

As Petitioners said at summary judgment, however, they saw no need to "get into that type of expert discussion." *Supra.* at 2. The record at summary judgment was therefore devoid of any expert testimony, social science studies or other items to dispute in any way that the Florida legislature could rationally have believed that it is in a child's best interests to be raised by a married mother and father, which was the chief interest Respondents put forward in support of the classification.

However imperfectly the gay adoption law may further the goal of placing adoptive children with married mothers and fathers, the legitimacy of that goal was never questioned below. Pet. App. 128a-29a. Given that heightened scrutiny is not applicable in this case, the petition does not present any substantial equal protection issues warranting certiorari.

III. THE DECISION BELOW AND THOSE OF OTHER LOWER COURTS HAVE BEEN FAITHFUL TO *LAWRENCE* AND *ROMER*.

Petitioners point to the decision in this and other cases, and say that certiorari is required because the lower courts are "disregarding" *Lawrence* and *Romer*. Pet. 19, 26-27. A fair review of the lower court decisions belies any such conclusion.

A. The court of appeals did not "disregard" *Lawrence* or *Romer* in deciding this case.

The decision below is absolutely faithful to the holdings and the rationales of *Lawrence* and *Romer*. Starting with *Lawrence*, the court of appeals carefully analyzed Petitioners'

claim that strict or heightened scrutiny was applicable to the gay adoption provision in this case. It rejected the claim only after performing a detailed analysis of *Lawrence* and concluding that because this Court itself used a rational basis review standard in striking down Texas' sodomy law, no heightened standard was therefore applicable to this case. Pet. 24-25.

Important among the Eleventh Circuit's reasons for this conclusion was that although this Court was asked by the petitioners in *Lawrence* and the ACLU as amicus to declare a fundamental right in *Lawrence*, the decision did not use the term "fundamental" in its discussion of the interests being protected. Pet. App. 19a-20a, Transcript of Oral Argument, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 1702534 at *4, 13; Brief Amici Curiae of the ACLU, *et al.*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 164132 at *11 - 25. The court of appeals also noted that the decision did not include an explicit analysis of whether any such fundamental right was deeply rooted in American history or implicit in the concept of ordered liberty, or any "careful description" of the right, as this Court has said must be done in such cases. Pet. App. 19a-21a, *citing Washington v. Glucksberg*, 521 U.S. 572 (1997).

Petitioners maintain that the absence of any express declaration of a fundamental right in *Lawrence* results from the fact that the *Lawrence* Court did not create a new right, but simply applied to gay people a preexisting "well-established *Griswold/Eisenstadt* right to private adult intimacy." Pet. 25. It is this asserted right Petitioners belatedly claim is burdened by the gay adoption law, which they therefore assert is subject to heightened judicial scrutiny. *Id.*

There are a number of good reasons to doubt that *Lawrence* can fairly be read to require heightened scrutiny in the

context of this case. First, neither *Griswold v. Connecticut,* 381 U.S. 479 (1965), nor *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognized any right of private adult intimacy as such. The privacy right in those decisions, like *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Servs. Int'l,* 431 U.S. 678 (1977), involved the personal and private decision whether or not to procreate. *See id.* at 688 n.5. Were it otherwise, such that a right of sexual intimacy had been "well established" long before *Lawrence,* Petitioners would not have waited until July, 2003 – two years after summary judgment – to raise a right of sexual privacy as to the adult plaintiffs in this case.

Second, to read so broad a right into *Lawrence* and apply it in this case would be inconsistent with the limits this Court placed on that decision. As was stated in *Lawrence*:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a

> realm of personal liberty which the government may not enter. [*Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)](internal quotations omitted). The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578 (emphasis added).

Unlike *Lawrence*, this case does involve minors. It also involves whether the government of the State of Florida must give formal recognition via adoption to relationships lesbians and gay men may seek to enter. As the Eleventh Circuit noted, to extend Petitioners' broad reading of *Lawrence* to this case would extend it to both situations. Pet. App. 22a.

The most critical distinction between *Lawrence* and this case is that this case involves adoption, long recognized as a public act that does not implicate privacy rights. *See Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989); Pet. App. 9a, 22a. As a civil law having force only in the context of adoption, the gay adoption provision does not implicate the interest addressed in *Lawrence*, which was freedom from the fear of a criminal prosecution for consensual sexual intimacy in the privacy and security of the home. *Id.* at 578.

The distinction is a stark one as between criminalizing private sexual conduct between consenting adults on the one hand, and putting the state's imprimatur on sexual conduct in an adoptive home on the other. The Constitution may enjoin the former, but it cannot workably require the latter.

The narrow focus of the interest protected in *Lawrence* is illustrated by the narrow scope of the "fundamental right" this

Court was asked to declare, namely, the right of sexual intimacy in the privacy of the home, and the right to be "let alone" in that intimacy. Brief Amici Curiae of the ACLU, *et al.*, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* 2003 WL 164132 at *25 (emphasis added). Consistent with that narrow scope, this Court emphasized in *Lawrence* that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id., citing Casey*, 505 U.S. at 847.

The government does not "enter" the world of a child being adopted from foster care. It is already there, standing in the stead of parents who have died or whose rights have been terminated. As the court of appeals recognized, it is proposed adoptive parents who seek to "enter" that realm, and who invite the government to appraise their parental qualities in a way it never could with natural parents. Pet. App. 9a, 22a.

Petitioners do not explain how any broad reading of *Lawrence* could be workably applied in the adoption context. In that context, Florida and the rest of the states have an obligation to evaluate prospective adoptive parents to determine which are best capable of caring for children and providing a secure family environment. Various legal criteria have been used in Florida and elsewhere to make that determination, many of which involve the most intimate and personal choices an individual can make about his or her life. Often these private choices enjoy fundamental rights status, such as marital status, whether to have children, where to live, what kind of work to do, or how to educate a child. In some states, like New York and California, religion is even a factor in adoptive placements, as it was in Florida until some recent rule changes. *See* N.Y. Family Law §116(e); Cal. Fam. Code §8709(a); Fla. Admin. Code § 65C-16.005(d) (2002). Notwithstanding the protection given to these private choices, they are routinely scrutinized by Florida and other states trying to match adoptive parents with

children. *See* Fla. Admin. Code § 65C-16.005(i) (adoptive parents to educate the child as to her "racial and ethnic heritage"); Fla. Stat. §63.042 (marital status); Fla. Admin. Code § 65C-16.005(e) (marital status); Fla. Admin. Code § 65C-16.005(j) (other children in family); Fla. Admin. Code § 65C-16.005(f) (residence in Florida); Fla. Admin. Code § 65C-16.005(g) (income level); Fla. Admin. Code § 65C-16.005(k) (working parents); Fla. Admin. Code § 65C-16.005(h) (housing and neighborhood).

To extend Petitioners' overbroad reading of *Lawrence* to this case would touch all such private choices. Administration of child welfare will be unprecedentedly difficult if every restriction in every adoption scheme in the country that intersects with a constitutional right has to be reviewed under heightened scrutiny.

Like laws creating complex social welfare systems that necessarily deal with the intimacies of family life, Florida's adoption law does not seek to "foist orthodoxy on the unwilling." *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). It is simply part of an adoption scheme by which all persons seeking the privilege of adoption – and not just lesbians and gay men – are screened in the process.

There is no express mention of heightened scrutiny being applied in *Lawrence*. Nor is there language explicitly grounding the decision either in substantive due process or in the *Eisenstadt/Carey* line of privacy cases. Given the holding in *Lawrence* that Texas' sodomy statute was invalid because it "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the court of appeals was justified in declining Petitioners' invitation to find that *Lawrence* requires any kind of heightened or strict scrutiny in this case. Pet. App. 22a. This is particularly true

where this case involves minors, formal recognition of relationships, and a civil law whose sole application is in the context of adoption, none of which were involved in *Lawrence*.

Petitioners next assert that this Court should grant certiorari because the court of appeals "disregarded" *Romer v. Evans*, 517 U.S. 620 (1996), in deciding this case. The truth, however, is that the facts of this case could hardly present a greater discontinuity with the facts of *Romer*, which provides no basis to disturb the decision below.

Romer involved a ballot initiative amending the Colorado Constitution to void all state and local sexual orientation non-discrimination laws. *Id.* at 624. This initiative, known as "Amendment 2," also prohibited any future "legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." *Id.* As a result, sexual orientation non-discrimination measures were forbidden to issue from any state or local legislature, executive branch, department, agency, political subdivision, municipality or school district except by another amendment of the Colorado Constitution by popular initiative. *Id.* at 624, 627.

The *Romer* Court described Amendment 2 as a measure whose "sweeping," "comprehensive," and "far-reaching" nature "[d]efied" equal protection analysis and "confound[ed]" the "normal process of judicial review." *Id.* at 627, 632. Although this Court did not go so far as to characterize Amendment 2 as a "per se" violation of equal protection as had been advocated in that case, it did state that the amendment was "unprecedented in our jurisprudence," and a "denial of equal protection of the laws in the most literal sense." *Id.* at 632-33.

The "unprecedented" and "confounding" nature of Colorado's Amendment 2 was central to the attack on its

constitutionality. As the ACLU told this Court when it argued *Romer*:

> The issue in [*Romer*] is not whether it might be rational to discriminate on the basis of sexual orientation in some specific context for some specific, legitimate purpose. The Court can and should leave for another day the question of whether some legitimate purpose can justify such limited discrimination.

Brief of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996), *available at* 1995 WL 417786 at *47.

It does no violence to *Romer* to distinguish it from this case. As the decision below explains, Florida's adoption law classifies on the basis of homosexual conduct or activity, not orientation. Pet. App. 2a. Moreover, it does so in a very specific and limited context for specific, limited purposes. Limited purposes, it should be said, that the Petitioners have never seriously questioned.

In moving for summary judgment below, Respondents argued that the gay adoption law was rationally related to a child's best interest in being raised by a married mother and father. They also argued that it is rational to believe children are harmed to the extent they are deprived of either a mother or a father. Pet. 128a-29a.

Petitioners did not dispute either contention. Instead, they said that they did "not see the need to get into that expert discussion in this motion because the fact is that still wouldn't explain the classification." R5-153-(Transcript of Oral Argument at 27); *see also* Pet. App. 129a n.17.

Thus, as the district court noted, the Petitioners in this case "did not object to nor disagree" that it is in the best interest of children to be placed for adoption with married heterosexual families. Pet. App. 129a-30a. They never disputed that children are harmed by not having both a mother and a father, and never argued that lesbian or gay families were able to serve the interests of stability or gender identification as well as married couples. *Id.* They therefore "left unchallenged Defendants' assertion that the best interest of a child is to be raised by a married family." *Id.* In the face of the concessions they made at summary judgment, Petitioners are not in a position to say that any court has "disregarded" *Romer* in deciding this case.

Petitioners do take issue with disqualifying lesbians and gay men from adoption under the circumstances where several thousand foster care children are waiting for adoption at any one time. Pet. 19, 30. But a permanent home at any cost is not a goal of child welfare. If it were, foster children would not have been removed from their natural parents in the first place. As the court of appeals recognized, the reality is that any restriction on who can adopt necessarily reduces the pool of adoptive parents. Pet. App. 33a. The logic of Petitioners' arguments in this case, however, would make all restrictions on who may adopt constitutionally suspect so long as there is any backlog of children waiting for adoption. *Id.*

As to that backlog, Petitioners assert that Florida denies a "real childhood" to "thousands of children" so that it "may use its adoption law to tell the world it disapproves of gay people." Pet. 19. The facts are, however, that Petitioners never showed that the gay adoption provision has ever limited the number of adoptions in any statistically significant way, let alone "thousands" of them. Nor did they show that other states permitting adoption by lesbians and gay men have "thousands" fewer foster care children waiting to be adopted as a result, or

even that placement is any less of a problem in those states.

Petitioners also suggest that *Romer* compels a finding that the gay adoption law is irrational because lesbians and gay men are permitted to become foster parents or guardians in Florida. Pet. 23. The suggestion is misplaced, however, because it rests on the faulty premise that standards for foster care parents or guardians cannot be more liberal than standards for permanent adoption. Such a premise would call into constitutional question any tighter restriction on who may adopt versus who may foster or become a guardian.

Florida law recognizes foster care placements as short-term in nature for most children, and in fact forbids long term foster care as a permanency option for all children under fourteen. Fla. Stat. §39.623(1). The fact that in practice some foster care relationships for younger children may endure beyond short time frames represents a failure of the system, not a constitutional problem with the adoption law. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 861 (1977) (Stewart, J., concurring).

As to guardians, there is continuing state court jurisdiction over any guardianship case, as Petitioners have acknowledged. Brief of Appellants, *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) at 55. As they also admit, the statutes creating guardianships do not create the equivalent of unsupervised care of natural parents over their children the way adoption does. *Id.* at 53. The fact that lesbians or gay men can become foster parents or guardians is therefore not inconsistent with the Florida's adoption law, which seeks to establish permanent relationship bestowing a familial name, inheritance, and the duty of child support, none of which are available in the case of foster parent and guardianship relationships.

The question the petition seeks to present suggests that it is irrational categorically to disqualify lesbians and gay men from adopting but no one else. The truth, however, is that there are other categorical disqualifications, such as Fla. Stat. § 435.045, which prohibits felons convicted of certain domestic violence and child abuse crimes from adopting children out of foster care. Because that statute is incorporated by reference into the requirements of a home study, it also applies to private adoptions where a child is adopted by anyone other than a stepparent or relative. Fla. Stat. §§ 63.092(3)(b); 63.112(b). And the court may order the home study even in those cases. Fla. Stat. 63.112(3). Also, no child outside those exceptions may be placed in an adoptive home where any resident, not just the parent, is a sexual predator or habitual criminal under applicable Florida statutes. Fla. Stat. § 63.092(3).

While not expressed in terms of disqualifications, other statutes also have the effect of categorical disqualifications, in that only certain adoptions are authorized. For example, single people are allowed to adopt, but unlike the case of married couples, there is no provision for single people to adopt jointly. Fla. Stat. § 63.042. And, a single person cannot adopt unless he or she is at least eighteen years old. *Id.*

Petitioners assert that it is irrational categorically to disqualify lesbians and gay men from adopting but not categorically to disqualify drug and child abusers. Pet. 23. But it is stipulated in this case that people whose drug or child abuse threaten children are in practice never permitted to adopt in Florida. Pet. App. 148a. As the court of appeals recognized, Petitioners "offered no evidence that [substance abusers and perpetrators of domestic violence] are in reality ever permitted to adopt in Florida and actually have stipulated to the contrary." Pet. App. 28a n.18. As the Eleventh Circuit also set out:

> Florida law bars foster care and adoptive placements by DCF
>
> 1. In any case in which a record check reveals a felony conviction for child abuse, abandonment, or neglect; for spousal abuse; for a crime against children, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide but not including other physical assault or battery, if the department finds that a court of competent jurisdiction has determined that the felony was committed at any time; and
>
> 2. In any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if the department finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years. Fla. Stat. § 435.045(1)(a).

Pet. App. 28a n.18.

The realities of Florida's adoption scheme are thus more complex than Petitioners allow. This is a large part of the reason *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), does not mandate reversal in this case, as Petitioners suggest. Pet. 23. In that case, the burden of obtaining a special use permit was placed on a home for the mentally retarded, but was placed on no other type of use despite the fact that the governmental interests claimed to be served by the ordinance – like preventing the home's location in a 500-year flood plain – were equally implicated in the other types of uses. *Cleburne*, 473 U.S. at 447-49. In fact, as the Supreme Court repeatedly emphasized in *Cleburne*, no restrictions of any kind were placed

on other uses, which included "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged . . . , private clubs or fraternal orders." In contrast to the home for mentally retarded in that case, these uses were "freely permitted" and "freely located" in the area, notwithstanding any alleged 500-year flood plain concerns. *Id.* at 448, 451.

The type of disparity which concerned the Court in *Cleburne* does not exist here. It is simply not the case that substance and/or child abusers are "freely permitted" to adopt on an unrestricted basis while lesbians and gay men are not. Florida requires the abuse history of all potential adoptive parents to be investigated using the Florida Abuse Hotline Information System. Fla. Admin. Code § 65C-16.007. Those convicted of relevant felonies are barred by statute, as above. Fla. Stat. § 435.045. And Petitioners agree that no child or substance abuser whose abuse threatens a child is ever permitted to adopt in Florida. Pet. App. 148a.

Under these circumstances, what little if any disparity there may be between Florida's treatment of the adoptive applications of lesbian and gay men on the one hand and persons whose abuse would threaten a child on the other represents no more than the ordinary type of incrementalism that is well within the legislature's purview, even if its incremental approach is significantly overinclusive or underinclusive. As this Court has explained repeatedly, "'the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.'" *Heller v. Doe,* 509 U.S. 312, 321 (1993), quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1917); see also *F.C.C. v. Beach Communications*, 508 U.S. 307, 316 (1993); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Under this standard, a State

does not have to enact legislation with "mathematical precision," "exact wisdom," or "nice adaptation of remedies." *Beach Communications*, 508 U.S. at 317, n.7, citing *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338, 354 (1907). Given the "practical" problems of government, an incremental approach to legislation is constitutionally permissible. As this Court has stated:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Beach Communications, 508 U.S. at 316, *quoting Williamson v. Lee Optical*, 348 U.S. at 489.

Petitioners next suggest that under *Romer*, DCF's asserted rational bases for the gay adoption provision should not be credited where there is evidence that animus motivated the law.[1] Pet. 25. *Romer* does not say that. It merely confirms

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[1] On this point Petitioners suggest that the primary defense of Florida's gay adoption law was to express moral disapproval, which they equate with animus. Pet. 14. The record in this case, however, is that Respondents' lead argument at summary judgment was that the law was rationally related to the best interests of children in being adopted by married mothers and fathers. R3-117-(MSJ at 14-16). And, although Respondents did argue

well-settled law that animus by itself – a "bare desire to harm" without reference to any independent consideration in the public interest –will not support a law. *Id.* at 634-35, *citing United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

This Court has repeatedly made clear that the mere presence of some alleged animus in the legislative record will not invalidate a law if there are other permissible bases adduced in support of it. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). Had *Romer* been intended to change that, *Garrett* could not have been decided as it was.

Given its radically different context, *Romer* provides no analogy to the facts of this case. Far from "ignoring" *Romer*, the Eleventh Circuit carefully considered the factual and legal analyses in the decision and correctly rejected the Petitioners' argument that they undermined the district court's grant of summary judgment. Petitioners accordingly fail to show that certiorari is warranted based any "disregard" of *Romer*.

B. Petitioners fail to show that other lower courts have "disregarded" *Lawrence* or *Romer*.

Petitioners assert that *Romer* and *Lawrence* have been disregarded in other lower court decisions, in addition to this case. Pet. 19. The assertion lacks merit.

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that the law was constitutional as an expression of moral disapproval, they also clearly said that it promoted public morality, as well. *Id.* at 17-19. It is therefore not accurate to suggest that the court of appeals "recharacterized" the defense as promoting public morality as opposed to disapproval of homosexuality. Pet. 14. Finally, although Petitioners say the law was passed during a 1977 "crusade" to "demonize gay people as a public menace" (Pet. at 6), the law has survived numerous attempts to repeal it long since that time. Pet. App. 2a. The most recent attempt, Fla. SB 2538, died in committee on April 30, 2004.

The first such case, where Petitioners say "[t]he problem began," is the Eleventh Circuit's decision in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), upholding the Georgia Attorney General's firing of an openly lesbian attorney who had participated in a "marriage" ceremony with her partner. Pet. 26. *Shahar* predated *Lawrence* by six years, however, and obviously did not "disregard" that decision.

Nor did *Shahar* "disregard" *Romer*. As the Eleventh Circuit emphasized time and again in that decision, the critical distinction between the cases was that *Shahar* did not involve the state acting as a sovereign enforcing generally applicable laws, whereas *Romer* did. Instead, *Shahar* involved a state acting as an employer making employment decisions in regard to an employee in a policy-making position. *Id.* at 1102-04.

As the *Shahar* court explained, governmental acts are reviewed differently when government acts as an employer, due to a public employer's significant interest in achieving its goals effectively and efficiently. *Id.* at 1102 (citation omitted). As this Court has noted, "the review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." *Id.*, *quoting Rankin v. McPherson*, 483 U.S. 378, 384-86 (1987). Moreover, a public employee in a policy-making position is in a "special class" of employees who "might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers." *Id.* at 1103 (citations omitted).

Repeatedly stressing that *Shahar* was a governmental employer case, the Eleventh Circuit distinguished *Romer*, noting that the firing of one employee in *Shahar* did not involve "the same kind of decision as an across-the-board denial of legal protection to a group because of their condition, that is, sexual orientation or preference." *Id.* at 1102-04. It was precisely

because *Romer* involved the state acting as sovereign – and not as employer – that the Eleventh Circuit said "*Romer* is no employment case." *Id.* at 1104; *see* Pet. at 27.

The next opinion with which Petitioners take issue is *Equality Foundation v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997), another pre-*Lawrence* case. In that case, the Sixth Circuit upheld a city charter amendment prohibiting municipal legislation granting special protection for gays and lesbians.

Petitioners suggest that *Equality Foundation* rested on a finding that it was "legitimate for government to discriminate against gay people in order to express its 'moral disapproval of homosexuality.'" Pet. 27. As Petitioners emphasized below, however, this statement was dicta, in that the Sixth Circuit expressly stated that it did not rest its decision on that ground. *Equality Foundation*, 128 F.3d at 301.

Far from the "casual regard" Petitioners say was paid to *Romer*, the detailed analysis reflected in the *Equality Foundation* decision shows that the Sixth Circuit faithfully applied the holding and rationale of *Romer* to the facts of that case. It simply found the cases distinguishable, since, unlike *Romer*, the city charter amendment at issue in *Equality Foundation* "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally-enacted special protection from gays and lesbians." *Id.*

Petitioners next point to a pair of state court decisions, *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004), and *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003), which they suggest are "helping to create jurisprudence that destroys the central meaning of what this Court did in *Lawrence* and *Romer*." Pet. 27-28. The

truth is, however, that *Limon* is still winding through the Kansas state courts, with the Kansas Supreme Court only just having heard oral argument in late August, 2004. As to *Standhardt,* Petitioners themselves say that the part of the opinion with which they take issue is "gratuitous" dicta. Pet. 28. *See California v. Rooney*, 483 U.S. 307 (1987)(writ of certiorari dismissed as improvidently granted on grounds that this Court "reviews judgments, not statements in opinions").

Critically, the *Limon* case involved minors, while the *Standhardt* case involved the recognition of gay marriage. Where *Lawrence* explicitly warned that its reach did not necessarily extend to these situations, it would be unrealistic to expect lower courts to ignore that warning.

In short, Petitioners fail to show that cases like *Shahar* and *Equality Foundation* support certiorari any more now than they did when this Court denied certiorari in both of those cases. Neither they nor this case provide any example of a lower court "disregarding" *Lawrence* or *Romer*.

C. Petitioners fail to show any disparity in the lower courts' treatment of *Lawrence* or *Romer*.

Petitioners assert that this Court's precedents in *Romer* and *Lawrence* are subject to "diverse" treatment by the lower courts, some of which "disregard" the decisions while others "faithfully follow" them. Pet. 19, 26, 29. As shown above, however, none of the courts Petitioners complain about has "disregarded" either decision. As to the other courts Petitioners say "faithfully follow" *Lawrence* and *Romer*, Petitioners fail to show how they interpret *Lawrence* and *Romer* any differently.

Of the approximately 350 federal and state court decisions citing to *Romer* in the last eight years, Petitioners

recognize only three as "faithfully following" that case. Pet. 26. Of these, only one is a decision from a federal court of appeals. *Id.* Even as to those three decisions, the entirety of Petitioners' discussion of the facts, holdings and rationales of the cases is relegated to a string cite followed by a single footnote that provides no insight as to what supposedly makes their treatment of *Romer* distinctive. Pet. 26, *id.* at n.15.

The first – and only federal court of appeals – decision Petitioners cite as "faithfully following" *Romer* is *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). *Stemler*, however, is distinguishable from *Shahar*, *Equality Foundation*, and this case.

Stemler was a constitutional tort case involving police who arrested a woman they thought was a lesbian for drunk driving, but not a "far drunker" heterosexual driver with whom she had been arguing. *Id.* at 873. In reviewing the district court's 12(b)(6) dismissal of her equal protection claim, the Sixth Circuit emphasized that:

> A selective enforcement claim such as this one is . . . conceptually different from a claim that a statute violates equal protection; while almost every statute can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.

Id. at 874. Given that the defendants in *Stemler* were "unable, and indeed [did] not even attempt[] to demonstrate any rational basis for enforcing drunk-driving laws against homosexuals but

not heterosexuals," the Sixth Circuit concluded that the plaintiff stated an equal protection claim for selective prosecution and reversed the dismissal of her complaint. *Id.* at 874-75.

As a selective enforcement case in which the defense offered no rational basis of any kind for its challenged actions, *Stemler* has no parallel in *Shahar, Equality Foundation,* or this case. It is scant evidence of any disparity in the lower courts' application of *Romer,* and therefore does not support a grant of certiorari in this case.

In passing, Petitioners mention two other examples of district courts they say have "faithfully followed" *Lawrence* and *Romer,* being *Glover v. Willamsburg Local School Dist.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998), and *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998). Pet. 26. Both decisions, however, predate *Lawrence.* As to *Romer*, Petitioners do not explain how the treatment of that decision is any different in those cases than in this one. Particularly in light of the fact that *Glover* and *Weaver* are district court decisions, Petitioners fail to show how they evidence such disparity in the decisions as to warrant certiorari in this case.

The only other case of any kind Petitioners cite as "faithfully following" *Lawrence* is *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), which involved a challenge to Article 125 of the Uniform Code of Military Justice, prohibiting sodomy. Pet. 26. Why they do is unclear, however, because the court in *Marcum* expressly rejected an ACLU request – the same request it has made in this case – to find that *Lawrence* recognized a fundamental right of adult sexual intimacy requiring strict scrutiny. *Marcum*, 60 M.J. at 205. In rejecting that request, the *Marcum* Court refused to invalidate Article 125 as unconstitutional, and furthermore affirmed a service member's conviction for violating it. *Id.* at 205, 208. One of

the five judges, Chief Judge Crawford, wrote separately to say that she would not have even reached a *Lawrence* analysis on her view that sexual intimacy between military personnel of unequal ranks fell outside the scope of any liberty interest described in *Lawrence*, which expressly excluded relationships where consent might not easily be refused. *Id.* at 213 (Crawford, C.J., dissenting in part, concurring in part).

In *Marcum*, and in the later case of *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces has established a case by case analytical framework to determine whether the facts supporting a particular military prosecution under Article 125 fall inside or outside any liberty interest described in *Lawrence*, taking into account additional factors relevant solely to the military. *Stirewalt*, 60 M.J. at 304; *citing Marcum*, 60 M.J. at 206-07. Under that framework, both decisions affirmed sodomy convictions under Article 125. Notably, Petitioners do not cite to even a single instance where any military court at any level has reversed an Article 125 sodomy conviction based on *Lawrence*.

Like the Eleventh Circuit in this case, the *Marcum* Court observed that *Lawrence* never used the term "fundamental" in describing the interest at issue. Pet. App. 19a; *Marcum*, 60 M.J. at 205. Like the Eleventh Circuit in this case, the *Marcum* Court perceived that this Court did not expressly state that it was applying any form of heightened scrutiny in *Lawrence*. Pet. App. 21a; *Marcum*, 60 M.J. at 205. And like the Eleventh Circuit in this case, the *Marcum* Court noted the circumstances in which *Lawrence* indicated it would not necessarily hold force. Pet. App. 22a; *Marcum*, 60 M.J. at 207-08.

In upholding Article 125, the *Marcum* Court emphasized that this Court has never said that all liberty or privacy interests

are protected as fundamental rights. *Marcum*, 60 M.J. at 205. This is exactly the same point Judge Birch made in his special concurrence to the denial of rehearing en banc in this case. Pet. App. 67a-68a. Under the circumstances where the *Marcum* Court has echoed the Eleventh Circuit in refusing to find that *Lawrence* recognized any new or preexisting fundamental right requiring strict scrutiny – and used a similar analysis in so doing – *Marcum* cannot point up any disparity in the lower courts' treatment of *Lawrence* that could possibly warrant certiorari. And no such disparity would merit certiorari now, where the issues are new enough – particularly in the case of *Lawrence* – to benefit from percolation in the lower courts.

There is of course no conflict present in the decisions discussed in the petition, and Petitioners rightly do not claim that one exists. The most they will say is that there is a "diversity of views" regarding *Lawrence* and *Romer*. Pet. 29. As shown above, however, such diversity as may exist in the decisions is in the facts of the cases, and not on their application of the holdings or the rationales of *Lawrence* and *Romer*.

Strikingly, Petitioners disclaim any argument that the outcome in *Shahar, Equality Foundation* or *Limon* would have been any different had *Lawrence* and *Romer* been applied to the facts of those cases in the way they advocate. Pet. 29. Given that Petitioners will not even say that the results in the cases they complain about would be any different if they were to obtain the relief requested, any claim that the issues in this case are so "important" as to warrant certiorari is undermined, and fatally so.

CONCLUSION

The petition for writ of certiorari should be denied.[2]

Respectfully submitted,

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[2] Petitioners suggest this Court should hold this case on account of the recess appointment of Judge Pryor to the court of appeals. Pet. 30. Since the petition was filed, however, the court of appeals has upheld Judge Pryor's appointment in *Stephens v. Evans*, 387 F.3d 1200 (11th Cir. 2004), a case squarely addressing at length the issue Petitioners mention in a passing footnote. Pet. 1 n.2. Because Petitioners never raised any question about Judge Pryor's February, 2004 appointment until after the July, 2004 denial of rehearing en banc, the issue was never addressed on the merits in this case. *Stephens* therefore represents a cleaner vehicle for any review of Judge Pryor's appointment, because this case presents the additional issues of whether Petitioners have waived the argument and whether Judge Pryor's acts in office are valid in any event under the de facto officer doctrine. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003). For the same reason, the issue is not fairly included by the question presented within the meaning of Rule 14.1.